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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

AMICUS CURIAE BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to the consent of the parties, the Independent Natural Gas Association of America ("INGAA") presents this brief in support of Texas Eastern's petition for writ of certiorari filed on March 30, 1970.

INTRODUCTION

The Opinion of the court below is appended to Texas Eastern's petition. Likewise, the jurisdictional requisites and statutory provisions involved are set forth in such petition.

INTEREST OF INGAA

INGAA is a non-profit trade association, whose membership includes virtually all of the interstate natural gas pipeline companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act (15 USC 717-717w). For many years, INGAA has appeared in rule making, rate and certificate proceedings before the Commission when issues affecting the general interests of the natural gas industry were involved. In this case, INGAA participated as an intervenor in support of Texas Eastern before the Commission and in the court below.

If the judgment of the court below is not reviewed by this Court, a new rule will have been established which will have subtsantial and immediate impact not only on Texas Eastern but on many other pipeline companies which are members of INGAA, and which, like Texas Eastern, absorbed rate increases filed by their suppliers in the expectation that when and if such increases were disallowed by the Commission, they would be entitled to claim and retain the amounts refunded. INGAA believes that the Commission's orders not only violate the Natural Gas Act but are fundamentally inequitable. Their effect, if sustained by this Court, will be industry-wide.

QUESTIONS PRESENTED

While INGAA believes that Texas Eastern's statement of Questions Presented fairly sets forth the basic issues involved in this case, INGAA's attention will be primarily focused on the following two questions:

1. Do the Commission's orders under review sanction an award of "reparations" contrary to the pro-

visions of the Natural Gas Act and controlling decisions of this Court?

2. Assuming reparations are not involved and the Commission has power to decide entitlement to supplier refunds, are the orders of the Commission and the decision of the court below in conflict with *FPC* v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949) and cases following, since it is undisputed that Texas Eastern "absorbed" the supplier rate increases which produced the subject refunds?

STATEMENT OF THE CASE

INGAA adopts the statement of the case made by Texas Eastern and will only relate such of the facts of the case as are necessary to an understanding of the points made in this brief.

In January 1961, the Commission approved a negotiated settlement of Texas Eastern's pending rate increase applications under Section 4(e) of the Natural Gas Act. It was agreed that Texas Eastern would flow through to its customers any supplier refunds (i) which were attributable to gas purchased during the period the settlement rates remained in effect and (ii) which resulted from the disallowance of any of the 520 specified supplier rate increase proceedings included in the cost of service used to fix the settlement rates. Texas Eastern was under no obligation to flow through any refunds it was entitled to receive as a result of the disallowance of (a) any of the 173 additional supplier rate increase proceedings filed before the settlement contract was approved and which were not included in the cost of service or (b) any supplier rate increases filed subsequent to the settlement.

Although its suppliers subsequently filed and collected additional rate increases subject to refund between 1961 and 1964, totaling approximately $20 million in excess of the costs used to establish the 1961 settlement rates, Texas Eastern did not attempt to increase its rates to pass on any of the additional costs to its customers but consistently sold gas to its customers at the rates fixed by the 1961 settlement. Certain of the supplier rate increases were disallowed and refunds required by the Commission pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717(c)(e). This case is concerned with the disposition of the refunds which Texas Eastern is not obligated by its 1961 settlement to flow through and which, at the time the settlement was made, it had every reason to believe and expect it would be allowed to retain.

In Opinion 540, issued May 3, 1968, the Commission ordered Texas Eastern to flow through all refunds in question. The Commission held that a pipeline's only protection against supplier rate increases would be the filing of its own "tracking" rate increases under Section 4. Since it was too late for Texas Eastern to file such increases with respect to supplier rate increases it had paid during 1961 through 1964, the Commission held that Texas Eastern was not entitled to any of the refunds because the Commission-approved rates charged its customers during the years 1962 through 1964 had resulted in Texas Eastern earning more than the rate of return the Commission in 1968 believed should have been earned during each of these past years. Accordingly, Texas Eastern's absorption of the rate increases which produced the subject refunds, plus the related fact that its customers' rates were not thereby increased, were not deemed to be controlling.

The Commission attempted to avoid the prohibition against reparations on the ground that it was neither recomputing Texas Eastern's past rates nor requiring Texas Eastern to refund amounts collected under its established rates. The court below affirmed on the ground that the Commission had the power of disposition over the refunds and therefore no question of reparations was involved.

REASONS FOR GRANTING THE WRIT

1. The far-reaching significance of this case is beyond dispute and for the most part has been conceded by all parties. This is true not only of the potential impact of the Commission's orders in question on numerous other pipeline companies, but also from the more general standpoint of the Commission's administration of its statutory power under the Natural Gas Act. In reaching its primary legal conclusion that Section 4(e) permitted the Commission to order payment of supplier refunds to parties other than Texas Eastern, the Commission departed from the plain meaning of Section 4(e) and repudiated its interpretation of such section consistently adhered to for many years. The new approach to its powers over disposition of refunds is predicated on certain general statements by this Court to the effect that the purpose of the Act was consumer protection. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959) (R. 745).

Thus, the Commission's legal theory is that it has plenary power to take any action it deems to be in the interest of ultimate consumers unless such action is expressly forbidden by the language of the Natural Gas Act. Moreover, where the express language does

forbid Commission action—as INGAA and Texas Eastern have contended is the case here—the Commission is free to disregard such language if contrary to the Commission's notion of what is required for consumer protection (R. 739). The courts, says the Commission, must go along if the Commission's interpretation and application of the statute has a "rational basis" (R. 739). The court below upheld Commission power over refunds on the basis of the "overriding purpose of the Natural Gas Act" as articulated in this Court's *Hope* and *CATCO* decisions. 414 F.2d at 347-48.

INGAA submits that the rationale of the Commission and the court below fits so poorly the actual regulatory situation confronting the Commission as to call into serious question the viability of the rationale itself. The Commission lacks jurisdiction over Texas Eastern's distribution company customers and their dealings with ultimate consumers. Obviously, a substantial portion of the refunds to be received by these customers under the Commission's orders will be attributable to industrial sales by such customers where there is absolutely no possibility of flow-through to ultimate consumers. Under any conception of equity and fair play it would have to be admitted that Texas Eastern has a superior claim to those refunds, but the Commission nevertheless ordered all of such refunds paid to Texas Eastern's customers. The general statements of this Court in *Hope* and *CATCO* are not a sufficient basis for the holdings below with the attendant illogical, unfair and imprecise results described above.

From this Court's recent decision in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), it is apparent that the

language of Section 4(e) of the Natural Gas Act should first be read for what it says, and that there are limits to what can be justified by reference to the overall purpose of the Act. There, this Court refused to order refunds below the level of permanently certificated rates filed with the Commission under Section 4 when it was subsequently determined that the "just and reasonable" rate was lower than the certificated rate. As recognized by the Court, the language of Section 4(e) did not expressly confine the Commission's refund powers in that instance, 391 U.S. at 23-24, but the Court presumably felt that the result was required by a fair construction of Section 4(e). This was done in spite of the fact that it is obvious that the refunds (the Commission's apparent index of consumer protection) would have been far greater had the Court not held the Commission's powers to be restricted.

Thus as to the basic issue in this case—the nature of the Commission's powers under Section 4(e)—there appears to be a conflict between the application of this Court's general statements in *Hope* and *CATCO* by the Commission and the court below and this Court's construction of the specific section of the Act involved here in *Sunray*. This situation urgently calls for this Court's review.

2. No amount of camouflage can conceal the seriousness of the reparations question fairly presented by this case. This Court has repeatedly held, and the Commission conceded (R. 746), that it lacked power to award reparations under the Natural Gas Act. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951); *FPC* v. *Sunray DX Oil Co., supra,* at 23-24. The Commission says, however,

that in bypassing Texas Eastern in disposing of the refunds, "no retroactive review of the past firm rates charged Texas Eastern's customers is involved" (R. 3688); that it is not ordering Texas Eastern to reduce or refund any part of its firm rates established by the 1961 rate settlement. Indeed, says the Commission, this case is hardly a rate proceeding at all; if it may be so considered, 'It is one ancillary to the rate proceedings which fixed the rates of Texas Eastern's suppliers.' (R. 747). It apparently follows, from the Commission's point of view, that the order complained of is not a reparation order [1] and hence not beyond the powers granted the Commission under the Natural Gas Act.

The court below apparently accepted the Commission's rationalization and dismissed Texas Eastern's and INGAA's argument as presenting a "form over substance or substance over form question" and stated that such argument "begs the question," for: "If the Commission has, as we have held, the power of disposition over the refunds, then the question becomes one

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[1] The Commission and the court below have overlooked the fact that the Act forbids the award of reparations, not merely retroactive rate making, which the Commission insists is not involved here. See *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287 (4th Cir. 1943), where the Commission itself distinguished between reparations and retroactive rate making and concluded that it had neither power: "As the Commission itself says, it was not given authority *to fix rates for the past or to award reparations on account of past rates*" (134 F.2d at 310). While reversing on other grounds, *FPC* v. *Hope Natural Gas Co., supra*, p. 5, this Court affirmed the view of the lower court with respect to reparations in the following language:

> ". . . [I]t is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force', § 5(a) . . ." (320 U.S. at 618).

of entitlement and not of reparations." 414 F.2d at 349. Such sloganeering cannot disguise the reality of what the Commission did. It ordered flow-through of refunds because for the past period to which the refunds related Texas Eastern earned more pursuant to Commission apparent rates than the Commission subsequently deemed proper. Had the Commission concluded that Texas Eastern's earnings had been at an acceptable level, Texas Eastern would have been allowed to retain the refunds. This is clearly a "taking from" Texas Eastern and an "award to" its customers of the refunds in question. Whether the question is put as a determination of Texas Eastern's "entitlement" to receive and retain the refunds, or as whether Texas Eastern should be required to "flow through" such refunds,[2] the substance is the same, *viz:* whether Texas Eastern retains the refunds in question depends solely upon a review of the earnings generated by its past firm rates.

The conflict between the decision of the Commission and the court below on the one hand and the "prospective only"[3] scheme of regulation required by Sections 4 and 5 of the Act on the other, is clearly to be seen from this Court's decision in *FPC* v. *Sunray Oil Co., supra.* In discussing the propriety of the Commission's ordering producers to make refunds below "inline" prices, the Court stated:

> "We adhere to the dicta in *Callery* and *Sunray Mid-Continent.* That outcome comports better with the language of § 4(e) than does the alterna-

[2] The Commission has stated the question both ways (R. 134; Com. Br. 2).

[3] See *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956).

ative. It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and does not expressly limit the refund to the rate increase or increment. However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase.' If it had been intended that the refund obligation should extend to greater amounts, the accounting requirement logically should have extended to them also. Viewing the Act more broadly, there is another reason why this interpretation of § 4(e) is preferable. *It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase his price, the Commission may not order him to make refunds simply because the just and reasonable rate for his area turns out to be below the in-line price. This would amount to a reparation order and this Court has repeatedly held that the Commission has no reparation power.*[10] It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if he had never increased his price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e)." (391 U.S. at 23-24, emphasis supplied).[4]

"[10] See e.g. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 618; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 340 U.S. 246, 254."

[4] The Court's construction of the Commission's Section 4(e) powers, wherein it referred to the accounting provision to shed light upon the extent of the Commission's power to order refunds, is likewise applicable here. The accounting provision of Section 4(e) requires the rate increase applicant "to keep accurate accounts in detail of all amounts received by reason of such increase,

To support its conclusion that reparations were not involved, the court below relied upon *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-83 (1949), and *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-230 (1965). *Callery*, which is exclusively concerned with refunds in a Section 7 certificate proceeding, is in no way relevant. Invocation of *Interstate* by the court below reveals a fundamental misconception of what the Commission did here and what this Court did there.

Interstate involved distribution of a fund created by the court of appeals pursuant to an order staying a Section 5 rate reduction. Various pipeline purchasers sought restoration of amounts they paid pursuant to the excessive rates which remained in effect pursuant to the court's stay order. No question of reparations or retroactive review of earnings was involved in that case, contrary to the situation involved here. Justice Douglas observed that there was "no claim that their [the pipeline purchasers'] rates have been so low that they are entitled to these refunds as a matter of law" (336 U.S. at 582). This Court directed that an equitable distribution be made of the stay fund proceeds and specified an absorption test for determining the entitlement of the pipeline claimants to the fund, which as noted *infra*, the Commission erroneously disregarded.

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specifying by whom and in whose behalf such amounts were paid." The context of the sentence clearly indicates that "refunds with interest" may be ordered paid to those for whom the rate increase applicant is required to maintain accounts. INGAA submits that the Commission and the court below erroneously read this Court's statement in *Sunray* as being inconsequential to an appropriate construction of the Commission's Section 4(e) powers in the case at hand.

3. Should it be conceded for the sake of argument that the Commission has power over the disposition of refunds resulting from disallowed Section 4(e) rate increases, INGAA believes that the Commission would be required to make an equitable distribution of the refunds in accordance with the guiding principle set forth by this Court in the *Interstate* case. The Commission made no pretense of doing this. Determining that the approved rates charged by Texas Eastern for the relevant past period were excessive, the Commission made no effort to weigh comparative equities between Texas Eastern and its customers.[5] Instead, the Commission merely awarded such refunds to Texas Eastern's customers, knowing full well that a substantial portion of such refunds must inure not to ultimate consumers but to the exclusive benefit of the customer. In so many words, the Commission conceded that this result was "inequitable" (R. 758). Overlooking this aspect of the Commission's decision, the court below erroneously thought that the rationale of *Interstate* "buttressed" its affirmance of the results reached by the Commission, since in *Interstate,* "refunds, created by the court's staying rate reductions were awarded disbursed in accordance with *equitable principles* . . ." (414 F.2d at 349-49).

To the contrary, the action of the Commission is condemned by *Interstate,* where this Court articulated the test to be utilized by the court of appeals in making an "equitable" distribution of the fund in question (336 U.S. at 582):

> "Moreover, if the pipeline companies passed on to their customers the rate reductions from the date

[5] The Commission neither required nor heard evidence from Texas Eastern's customers as to any equitable claims they might have to the refunds.

> of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from those exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund. It is the responsibility of the court which distributes the fund accumulated under its stay order 'to correct that which has been wrongfully done by virtue of its process.' *United States* v. *Morgan,* 307 U.S. 183, 197. That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action."

The principle of *Interstate,* applied there to pipelines which had passed on a rate reduction, applies equally as well to this case. Here, Texas Eastern, by not passing on the supplier rate increases, should be entitled to a return of the excessive payments it made to such suppliers. Likewise, Texas Eastern's customers, whose rates were not increased, can "show no loss by reason of" the supplier rate increases, Texas Eastern having absorbed the same.

The Commission seemed to think that it made a difference that a rate increase situation was presented here as distinguished from the stay of a rate reduction involved in *Interstate.* However, this is a difference without distinction, for in *Northern Natural Gas Co.* v. *FPC,* 215 F.2d 892 (8th Cir. 1954), the principle of *Interstate* was applied to a court-ordered stay of the Commission's disallowance of certain elements of a Section 4(e) rate increase. The conflict[6] between the

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[6] The court below did not mention *Northern Natural* or make any effort to resolve this irreconcilable conflict, presumably on the ground that the Fifth Circuit was not bound by the Eighth Circuit's decision. The conflict, however, should be resolved by this Court.

Commission's action as approved by the court below and the decision in *Northern Natural, supra,* is well illustrated by its treatment in California's brief, p. 14-15, where after an admittedly unsuccessful attempt to distinguish the case, "California therefore submits that *Northern Natural should not be followed.*" Thus, there exists a serious conflict between the results reached by the Commission and the court below and this Court's decision in *Interstate* and its progeny, which should be resolved on review by certiorari. See also, *United Fuel Gas Co.* v. *FPC,* 367 F.2d 34, 37 (4th Cir. 1966); *Northern Natural Gas Co.* v. *FPC,* 245 F.2d 447, 449-50 (8th Cir. 1957); *Northern Natural Gas Co.* v. *FPC,* 254 F.2d 466 (8th Cir. 1958).

CONCLUSION

For the foregoing reasons, INGAA submits that the writ of certiorari should be granted as prayed for by Texas Eastern.

Respectfully submitted,

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